Senate Bill No. 606
(By Senators Palumbo, Unger, Jenkins, Klempa and Foster)

[PASSED MARCH 10, 2012; IN EFFECT NINETY DAYS FROM PASSAGE.]
AN ACT to amend and reenact §60A-7-706 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto six new sections, designated §61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all relating to forfeiture of certain property; correcting a technical error; stating legislative findings; providing for the forfeiture of certain materials related to recording sexually explicit conduct of minors or soliciting minors; establishing a procedure for seizure of forfeitable property; creating procedures for forfeiture; setting process for disposition and distribution of forfeited moneys, securities and negotiable instruments; and creating process for disposition and distribution of other forfeited properties.

Be it enacted by the Legislature of West Virginia:

That §60A-7-706 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto six new sections, designated §61-8C-6, §61-8C-7, §61-8C-8, §61-8C-9, §61-8C-10 and §61-8C-11, all to read as follows:

CHAPTER 60A. UNIFORM CONTROLLED SUBSTANCES ACT.

ARTICLE 7. WEST VIRGINIA CONTRABAND FORFEITURE ACT.
§60A-7-706. Disposition of forfeited moneys, securities or other negotiable instruments; distribution of proceeds.

(a) Whenever moneys, securities or other negotiable instruments are forfeited under the provisions of this article, such proceeds shall be distributed as follows:

1. Ten percent of the proceeds shall be tendered to the office of the prosecuting attorney which initiated the forfeiture proceeding;

2. The balance shall be deposited in a special law-enforcement investigation fund. The fund may be placed in any interest-bearing depository insured by an agency of the federal government. The fund shall be administered by the chief of the law-enforcement agency that seized the forfeited property.

(b) No funds shall be expended from the special law-enforcement investigation fund except as follows:

1. In the case of the funds belonging to the State Police, the funds shall only be expended at the direction of the Superintendent of the State Police and in accordance with the provisions of article two, chapter eleven-b of this code and the provisions of subdivision (10), subsection (b), section two, article two, chapter twelve of this code;

2. In the case of funds belonging to the office of either the sheriff or prosecuting attorney of any county in which the special fund has been created, the funds therein may only be expended in the manner provided in sections four and five, article five, chapter seven of this code; and

3. In the case of funds belonging to the police department of any municipality in which the special fund has been created, the funds therein may only be expended in the manner provided in section twenty-two, article thirteen, chapter eight of this code.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 8C. FILMING OF SEXUALLY EXPLICIT CONDUCT OF MINORS.
§61-8C-6. Legislative findings.

1 The Legislature hereby finds and declares that the seizure and sale of items under the provisions of this article is not contemplated to be a forfeiture as the same is used in article twelve, section five of the West Virginia Constitution and to the extent that such seizure and sale may be found to be such a forfeiture, the Legislature hereby finds and declares that the proceeds from a seizure and sale under this article is not part of net proceeds as the same is contemplated by such article twelve, section five of the West Virginia Constitution.

§61-8C-7. Items subject to forfeiture; persons authorized to seize property subject to forfeiture.

(a) The following are subject to forfeiture:

1 (1) All visual depictions which have been manufactured, distributed, dispensed or possessed in violation of article eight-a or eight-c of this chapter or section fourteen-b, article three-c of this chapter;

2 (2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, processing, delivering, importing or exporting any visual depictions or any crimes against children in violation of article eight-a or eight-c of this chapter or section fourteen-b, article three-c of this chapter;

3 (3) All books, records, research products and materials, including hard drives, microfilm, tapes and data which are used, or have been used, or are intended for use, in violation of article eight-a or eight-c of this chapter or section fourteen-b, article three-c of this chapter;

4 (4) All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished in violation of articles eight-a or eight-c of this chapter or section fourteen-b, article three-c of this chapter by any person in exchange for a visual depiction, all proceeds traceable to the exchange and all moneys, negotiable
23 instruments and securities used, or which are intended to be
24 used, to facilitate any violation of article eight-a or eight-c
25 of this chapter or section fourteen-b, article three-c of this
26 chapter: Provided, That no property may be forfeited under
27 this subdivision, to the extent of the interest of an owner, by
28 reason of any act or omission established by that owner to
29 have been committed or omitted without his or her knowl-
30 edge or consent; and

31 (5) All conveyances, including aircraft, vehicles or
32 vessels, which are used, have been used, or are intended for
33 use, to transport, or in any manner to facilitate the transpor-
34 tation, sale, receipt, possession or concealment of property
35 described in subdivision (1), (2) or (3) of this subsection,
36 except that:

37 (A) A conveyance used by any person as a common
38 carrier in the transaction of business as a common carrier
39 shall not be forfeited under this section unless it appears that
40 the person owning the conveyance is a consenting party or
41 privy to a violation of article eight-a or eight-c of this
42 chapter or section fourteen-b, article three-c of this chapter;

43 (B) A conveyance shall not be forfeited under the
44 provisions of this article if the person owning the conveyance
45 establishes that he or she neither knew, nor had reason to
46 know, that the conveyance was being employed or was likely
47 to be employed in a violation of article eight-a or eight-c of
48 this chapter or section fourteen-b, article three-c of this
49 chapter; and

50 (C) A bona fide security interest or other valid lien in any
51 conveyance shall not be forfeited under the provisions of this
52 article, unless the state proves by a preponderance of the
53 evidence that the holder of the security interest or lien either
54 knew, or had reason to know, that the conveyance was being
55 used or was likely to be used in a violation of article eight-a
56 or eight-c of this chapter or section fourteen-b, article three-
57 c of this chapter.

58 (b) Property subject to forfeiture under this article may
59 be seized by the State Police (hereinafter referred to as the
60 "appropriate person" in this article).
(c) Visual depictions which are manufactured, possessed, transferred, sold or offered for sale in violation of this article are contraband and shall be seized and summarily forfeited to the state. Visual depictions which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state upon the seizure of the visual depictions.

(d) Notwithstanding any other provisions of this article to the contrary, any items of tangible personal property sold to a bona fide purchaser are not subject to forfeiture unless the state establishes by clear and convincing proof that the bona fide purchaser knew or should have known that the property had in the previous three years next preceding the sale been used in violation of this chapter.

(e) Notwithstanding any other provisions of this code to the contrary, any person who has an ownership interest in items of tangible personal property subject to forfeiture by this article shall be presumed to be an innocent owner. Unless the state establishes by clear and convincing proof that the innocent owner knew or should have known that the property subject to forfeiture had been used in violation of article eight-a or eight-c of this chapter or section fourteen-b, article three-c of this chapter and, if applicable, that the innocent owner did not do all that reasonably could be expected under the circumstances to terminate the illegal use of the property once he or she had knowledge of it, the court shall enter an order either: (1) Severing the property appropriately; (2) transferring the property to the state with a provision that the state shall compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or (3) permitting the innocent owner to retain the property subject to a lien in favor of the state to the extent of the forfeitable interest in the property. If the state meets the burden set forth in this section, then the court shall enter an order declaring the person with an ownership interest is not an innocent owner and allowing forfeiture proceedings to continue, pursuant to the requirements set forth in this article.

(a) Seizure of property made subject to forfeiture by the provisions of this article may be made upon process issued by any court of record having jurisdiction over the property.

(b) Notwithstanding the provisions of subsection (a) of this section, seizure of property subject to forfeiture by the provisions of this article may be made without process if:

(1) The seizure is incident to a lawful arrest or pursuant to a search under a search warrant or an inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding based upon this article;

(3) The appropriate person has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The appropriate person has probable cause to believe that the property was used or intended for use in violation of this chapter.

(c) In the event of seizure pursuant to subsection (b) of this section, forfeiture proceedings shall be instituted within ninety days of the seizure thereof.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the appropriate person, subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is seized under this article, the appropriate person may:

(1) Place the property under seal;

(2) Remove the property to a place designated by him or her;

(3) Require the appropriate law-enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law; or
(4) In the case of seized moneys, securities or other negotiable instruments, place the assets in any interest-bearing depository insured by an agency of the federal government.


(a)(1) Any proceeding wherein the state seeks forfeiture of property subject to forfeiture under this article shall be a civil proceeding. A petition for forfeiture may be filed on behalf of the state and any law-enforcement agency making a seizure under this article by the prosecuting attorney of a county, or duly appointed special prosecutor.

(2) A petition for forfeiture may be filed and proceedings held thereon in the circuit court of the county wherein the seizure was made, the real property subject to forfeiture is situate or the circuit court of the county wherein any owner of the property subject to forfeiture may reside.

(3) Any civil trial stemming from a petition for forfeiture brought under this article at the demand of either party shall be by jury.

(4) A petition for forfeiture of the seized property shall be filed within ninety days after the seizure of the property in question. The petition shall be verified by oath or affirmation of a law-enforcement officer representing the law-enforcement agency responsible for the seizure or the prosecuting attorney and shall contain the following:

(A) A description of the property seized;

(B) A statement as to who is responsible for the seizure;

(C) A statement of the time and place of seizure;

(D) The identity of the owner or owners of the property, if known;

(E) The identity of the person or persons in possession of the property at the time seized, if known;
(F) A statement of facts upon which probable cause for belief that the seized property is subject to forfeiture pursuant to the provisions of this article is based;

(G) The identity of all persons or corporations having a perfected security interest or lien in the subject property, as well as the identity of all persons or corporations known to the affiant who may be holding a possessory or statutory lien against such property; and

(H) A prayer for an order directing forfeiture of the seized property to the state, and vesting ownership of such property in the state.

(b) At the time of filing or as soon as practicable thereafter, a copy of the petition for forfeiture shall be served upon the owner or owners of the seized property, as well as all holders of a perfected security interest or lien or of a possessory or statutory lien in the same class, if known. Should diligent efforts fail to disclose the lawful owner or owners of the seized property, a copy of the petition for forfeiture shall be served upon any person who was in possession or alleged to be in possession of the property at the time of seizure, where such person's identity is known. The above service shall be made pursuant to the provisions of the West Virginia Rules of Civil Procedure. Any copy of the petition for forfeiture so served shall include a notice substantially as follows: "To any claimant to the within described property: You have the right to file an answer to this petition setting forth your title in, and right to possession of, the property within thirty days from the service hereof. If you fail to file an answer, a final order forfeiting the property to the state will be entered, and such order is not subject to appeal."

If no owner or possessors, lien holders or holders of a security interest be found, then such service may be by Class II legal publication in accordance with the provisions of article three, chapter fifty-nine of this code, and the publication area shall be the county wherein such property was located at the time of seizure and the county wherein the petition for forfeiture is filed.
(c) In addition to the requirements of subsection (b) above, the prosecuting attorney or law-enforcement officer upon whose oath or affirmation the petition for forfeiture is based, shall be responsible for the publication of a further notice. Such further notice that a petition for forfeiture has been filed shall be published by Class II legal advertisement in accordance with article three, chapter fifty-nine of this code. The publication area shall be the county wherein the property was seized and the county wherein the petition for forfeiture is filed. The notice shall advise any claimant to the property of their right to file a claim on or before the date set forth in the notice, which date shall not be less than thirty days from the date of the first publication. The notice shall specify that any claim must clearly state the identity of the claimant and an address where legal process can be served upon that person. In addition such notice shall contain the following information:

(1) A description of the property seized;

(2) A statement as to who is responsible for the seizure;

(3) A statement of the time and place of seizure;

(4) The identity of the owner or owners of the property, if known;

(5) The identity of the person or persons in possession of the property at the time of seizure, if known; and

(6) A statement that prayer for an order directing forfeiture of the seized property to the state, and vesting ownership of such property in the state shall be requested of the court.

(d) If no answer or claim is filed within thirty days of the date of service of the petition pursuant to subsection (b) of this section, or within thirty days of the first publication pursuant to subsection (b) of this section, the court shall enter an order forfeiting the seized property to the state. If any claim to the seized property is timely filed, a time and place shall be set for a hearing upon such claim. The claim-
101 ant or claimants shall be given notice of such hearing not
102 less than ten days prior to the date set for the hearing.

103 (e) At the hearing upon the claim or claims, the state
104 shall have the burden of proving by a preponderance of the
105 evidence that the seized property is subject to forfeiture
106 pursuant to the provisions of this chapter.

107 (f) Any order forfeiting property to the state and entered
108 pursuant to this section perfects the state's right, title and
109 interest in the forfeited property and relates back to the date
110 of seizure: Provided, That in any proceeding under this
111 article the circuit court shall in its final order make specific
112 findings with respect to whether or not probable cause to
113 seize such property existed at the time of such seizure.

114 (g) During the pendency of a forfeiture proceeding, it is
115 unlawful for any property owner or holder of a bona fide
116 security interest or other valid lien holder to transfer or
117 attempt to transfer any ownership interest or security
118 interest in seized property with the intent to defeat the
119 purpose of this article, and the court wherein the petition for
120 forfeiture is filed may enjoin a property owner or holder of
121 a security interest or other lien holder from making such a
122 transfer should one come to its attention. Any such transfer
123 which is made in violation of the provisions of this subsec-
124 tion shall have no effect upon an order of the court forfeiting
125 seized property to the state if a notice of lis pendens is filed
126 prior to the recording of the instrument of transfer.

127 (h) The court may void any transfer of property made
128 before or after a forfeiture proceeding has been commenced,
129 which is subject to forfeiture, if the transfer was not to a
130 bona fide purchaser without notice for value.

131 (i) An appeal of a decision of the circuit court concerning
132 a forfeiture proceeding brought pursuant to this chapter
133 must be filed within one hundred twenty days of the date of
134 entry of the final appealable order. The appellant shall be
135 required to give notice of intent to appeal within thirty days
136 of the entry of such appealable order.
§61-8C-10. Disposition of forfeited moneys, securities or other negotiable instruments; distribution of proceeds.

1 (a) Whenever moneys, securities or other negotiable instruments are forfeited under the provisions of this article, such proceeds shall be distributed as follows:

2 (1) Ten percent of the proceeds shall be tendered to the office of the prosecuting attorney which initiated the forfeiture proceeding;

3 (2) The balance shall be deposited in a special law-enforcement investigation fund. The fund may be placed in any interest-bearing depository insured by an agency of the federal government. The fund shall be administered by the Superintendent of the State Police or his or her designee.

4 (b) No funds shall be expended from the special law-enforcement investigation fund except as follows:

5 (1) In the case of funds belonging to the State Police, the funds shall only be expended at the direction of the Superintendent of the State Police and in accordance with the provisions of article two, chapter eleven-b of this code and the provisions of subdivision (10), subsection (b), section two, article two, chapter twelve of this code;

6 (2) In the case of funds belonging to the office of the prosecuting attorney of any county in which the special fund has been created, the funds therein may only be expended in the manner provided in sections four and five, article five, chapter seven of this code; and

7 (3) In the case of funds belonging to the police department of any municipality in which the special fund has been created, the funds therein may only be expended in the manner provided in section twenty-two, article thirteen, chapter eight of this code.

§61-8C-11. Disposition of other forfeited property; distribution of proceeds.
(a) When property other than that referred to in section ten of this article is forfeited under this article, the circuit court ordering the forfeiture, upon application by the prosecuting attorney or the Superintendent of the State Police or his or her designee, may direct that:

(1) Title to the forfeited property be vested in the law-enforcement agency so petitioning;

(2) The law-enforcement agency responsible for the seizure retain the property for official use; or

(3) The forfeited property shall be offered at public auction to the highest bidder for cash. Notice of such public auction shall be published as a Class III legal advertisement in accordance with article three, chapter fifty-nine of this code. The publication area shall be the county where the public auction will be held.

(b) When a law-enforcement agency receives property pursuant to this section, the court may, upon request of the prosecuting attorney initiating the forfeiture proceeding, require the law-enforcement agency to pay unto the office of said prosecuting attorney a sum not to exceed ten percent of the value of the property received to compensate said office for actual costs and expenses incurred.

(c) The proceeds of every public sale conducted pursuant to this section shall be paid and applied as follows: First, to the balance due on any security interest preserved by the court; second, to the costs incurred in the storage, maintenance and security of the property; and third, to the costs incurred in selling the property.

(d) Any proceeds of a public sale remaining after distribution pursuant to subsection (c) of this section shall be distributed as follows:

(1) Ten percent of such proceeds shall be tendered to the office of the prosecuting attorney who initiated the forfeiture proceeding.
(2) The balance shall be deposited in a special law-enforcement investigation fund. Such fund shall be administered by the Superintendent of the State Police or his or her designee and shall take the form of an interest-bearing account with any interest earned to be compounded to the fund. Any funds deposited in the special law-enforcement investigative fund pursuant to this article shall be expended only to defray the costs of protracted or complex investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants or for such other law-enforcement purposes as the Superintendent of the State Police or his or her designee may deem appropriate; however, these funds may not be utilized for regular operating needs.

(e) If more than one law-enforcement agency was substantially involved in effecting the seizure and forfeiture of property, the court wherein the petition for forfeiture was filed shall equitably distribute the forfeited property among the law-enforcement agencies. In the event of a public sale of such property pursuant to subsection (a) of this section, the court shall equitably distribute any proceeds remaining after distribution pursuant to subsection (c) and subdivision (1), subsection (d) of this section among such law-enforcement agencies for deposit into their individual special law-enforcement investigative fund. Equitable distribution shall be based upon the overall contribution of the individual law-enforcement agency to the investigation which led to the seizure.

(f) Upon the sale of any forfeited property for which title or registration is required by law, the state shall issue a title or registration certificate to any bona fide purchaser at a public sale of the property conducted pursuant to subsection (a) of this section. Upon the request of the law-enforcement agency receiving, pursuant to the order of the court, or electing to retain, pursuant to subsection (a) of this section, any forfeited property for which title or registration is required by law, the state shall issue a title or registration certificate to the appropriate governmental body.
(g) Any funds expended pursuant to the provisions of this section, shall only be expended in the manner provided in subsection (b), section ten of this article.

(h) Every prosecuting attorney or law-enforcement agency receiving forfeited property or proceeds from the sale of forfeited property pursuant to this article shall submit an annual report to the body which has budgetary authority over such agency. Such report shall specify the type and approximate value of all forfeited property and the amount of proceeds from the sale of forfeited property received in the preceding year. No county or municipality may use anticipated receipts of forfeited property in their budgetary process.

(i) In lieu of the sale of any forfeited property subject to a bona fide security interest preserved by an order of the court, the law-enforcement agency receiving the forfeited property may pay the balance due on any security interest preserved by the court from funds budgeted to the office or department or from the special fund and retain possession of the forfeited property for official use pursuant to subsection (a) of this section.

(j) In every case where property is forfeited, disposition of the forfeited property, in accordance with this article, shall be made within six months of the date upon which the court of jurisdiction orders forfeiture. Should the office or agency receiving the property fail either to place the property in official use or dispose of the property in accordance with law, the court of jurisdiction shall cause disposition of the property to be made with any proceeds therefrom to be awarded to the state.

(k) No disposition shall occur until all applicable periods for filing a notice of intent to appeal has expired and no party in interest shall have filed such notice. The filing of the notice of intent to appeal shall stay any such disposition until the appeal has been finally adjudicated or until the appeal period of one hundred eighty days has expired without an appeal having actually been taken or filed, unless
a valid extension of the appeal has been granted by the circuit court under the provisions of section seven, article four, chapter fifty-eight of this code.

(1) The special law-enforcement investigative funds of each law-enforcement agency may be placed in an interest-bearing depository insured by the federal government.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 30th Day of March, 2012.

Governor